UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

MARK TWAIN MEDICAL CENTER, AN AFFILIATE OF DIGNITY COMMUNITY CARE[1]

Employer

and **Case 32-RC-265234**

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST

Petitioner

DECISION AND DIRECTION OF ELECTION

Mark Twain Medical Center, An Affiliate of Dignity Community Care (Employer) operates an acute care hospital in San Andreas, California. The Petitioner, Service Employees International Union, United Healthcare Workers-West (Petitioner or Union) seeks to include a voting group consisting of 17 employees in the nurse practitioner, social worker, and house supervisor classifications in its existing multi-facility unit.

It is not disputed that, absent the issue in this case, Petitioner seeks a proper self-determination election; the parties stipulate the classifications sought are an identifiable, distinct segment of the workforce that share a community of interest of interest with the existing unit. However, the Employer asserts that 8 of the employees in the petitioned-for voting group, in the house supervisor classification, are statutory supervisors within the meaning of Section 2(11) of the National Labor Relations Act (Act) and are properly excluded. Petitioner maintains that the house supervisors are not statutory supervisors and are properly included.

A hearing officer of the National Labor Relations Board (Board) held a videoconference hearing in this matter on September 16 and 17, 2020.[2] Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs, and the relevant Board law, I find the record stablishes the Employer has not met its burden of establishing that the house supervisors are statutory supervisors within the meaning of Section 2(11) of the Act. Accordingly, because the petitioned-for voting group is an identifiable, distinct segment of the workforce that

[1] The name of the Employer appears as amended at hearing.
[2] All dates 2020 unless otherwise indicated.

shares a community of interest with the existing bargaining unit, I have directed the petitioned-for self-determination election.

RECORD EVIDENCE

A. The Employer's Operation

The Employer's parent network operates facilities throughout California, including multiple acute care hospitals and affiliated clinics. Petitioner represents approximately 16,000 of the Employer's employees, employed at approximately 30 facilities, in a single mixed professional and non-professional bargaining unit (existing unit). The existing unit is covered by a single collective bargaining agreement with effective dates of March 16, 2018 to April 30, 2023 (the Agreement).[3]

Mark Twain Medical Center (the Employer's facility or the hospital), the facility involved in this case, is a 25-bed acute care hospital located in San Andreas, California. The hospital has numerous in-patient departments or units, including a medical/surgical (med/surg), telemetry, intensive care, and emergency department. The hospital also offers outpatient services such as physical and occupational therapy, cardiac rehabilitation, and pulmonary rehabilitation. Petitioner represents 262 employees at this facility as part of the existing unit. These employees are employed in diverse positions, including service, technical, business office/clerical, registered nurse, professional, and skilled maintenance classifications.

At issue in the present case are the house supervisors employed at the hospital. The house supervisors are registered nurses but historically have not been included with the other registered nurses in the existing unit. House supervisors are responsible for efficiently arranging certain staff in the clinical departments: med/surg, telemetry, intensive care and emergency. House supervisors also match nurses to patients, bring in or call off nurses based on need, and move nurses between departments. The nursing staff report to the director of patient care services, as do the nurse supervisors.

The nursing staff, including house supervisors, work 12-hours shifts, 6:00 a.m. to 6:00 p.m., or 6:00 p.m. to 6:00 a.m., with some overlap for reporting. House supervisors are paid within the same wage range as the registered nurses, but some of their benefits differ as a function of the collective bargaining agreement covering registered nurses. The house supervisors have desk space, but typically work on the floor of the hospital in the departments where they manage staffing.

House supervisors complete regulatory compliance paperwork and document the assignments made on a given shift. House supervisors are also frequently the first

[3] The existing unit does not include any house supervisors. However, the hospital at issue is the only facility where registered nurses are represented by Petitioner. Registered Nurses at other facilities are represented by the California Nurses Association, which has a separate collective bargaining agreement with the Employer.

representative of the Employer called if a patient has a complaint, either on the floor or by telephone. Typically, house supervisors do not perform direct patient care; they function as floor nurses only as a last step to address understaffing, used only if the other tools available to them to secure staffing are unsuccessful.

B. House Supervisor Authority

i) Assign

(1) Staffing Levels

One house supervisor is scheduled per shift, and that individual is responsible for managing the nursing staff level for the med/surg, telemetry, intensive care, and emergency departments. The proper staffing level in each department on each shift is a function of staffing ratios, patient acuity, and productivity.

The first factor, staffing ratios, are regulatory requirements set by the State of California. The Employer is required to maintain a one-nurse-to-five-patient ratio in med/surg, one-to-four in telemetry, one-to-two in intensive care and emergency, with certain minimums. Patient acuity is the severity of the patient's condition as a function of how much of a nurse's time they are likely to require, assessed on a scale of low, moderate, and high. This determination is made collectively by the nursing staff and house supervisor on each shift. Productivity is a nursing-hours-per-patient-per-day benchmark established by the Employer at the network level.[4]

The Employer consistently schedules the same staffing levels. Typically, this is two or three nurses scheduled per shift in med/surg and intensive care, and four in emergency. However, patient levels fluctuate continually, and it is the responsibility of the house supervisor to adjust that staffing so that each unit has enough staff to meet regulatory requirements but minimizing excess staffing in order to maximize productivity.

If a department has a low patient census and more nurses are scheduled than desirable under the productivity goals, it is the house supervisor's responsibility to reduce staffing. Staff may be placed in stand-by status or flexed off, with stand-by status allowing the Employer to call the employee back to work if necessary, albeit at a double time wage rate. Whether staff are placed in stand-by or flexed off is largely a function of department, with employees working in departments with more predictable patient inflows, such as med/surg, using the flex off method and a department with more uncertainty, such as intensive care, utilizing stand-by. How a staffing reduction is handled is a function of the existing unit contract. The house supervisor first offers the option to the most senior nurse on the shift who makes the choice voluntarily. If that

[4] The director of patient care services is responsible for meeting the Employer's productivity standards. The director of patient care receives a monthly report on productivity compliance that may be shared with some or all house supervisors.

employee declines the offer continues by seniority. If no employee volunteers, then the least senior nurse is required to stop working. Prior to the pandemic, this did occur with some frequency, and at hearing it was estimated as perhaps once or twice a week.

When staffing is too low, a similar system is in place. The director of patient care services has created a pre-arranged group text for each department. When staff call in sick, or a house supervisor becomes aware that additional staff are needed due to a high census, the house supervisor sends a text message soliciting volunteers on this shared group text. If volunteers are not forthcoming, the house supervisor sends the same group a text message offering in-house registry premium pay (IHR premium) for taking the shift.[5] The IHR premium is addressed by the existing unit contract, primarily the amount, but also the circumstances where it is appropriately applied. If this initial offer is unsuccessful, the house supervisor may extend the offer to other departments – the Agreement requires that nursing staff in a department must decline the offer of an IHR premium before it can be offered to other departments – ask nursing staff scheduled for the next shift to come in early, or ask staff coming off shift to stay late. At hearing it was estimated that IHR premium has been offered almost daily during the current pandemic but prior to this development it was less frequent. In each instance the house supervisors are making an offer, they do not have the authority to require an individual to report to work or require mandatory overtime. Departments are not required to have staffing adjustments made by the house supervisor. The emergency department, for example, normally obtains coverage for open shifts without relying upon the house supervisor to fill an opening.

House supervisors also adjust staffing by inter-departmental transfers, or "floating" employees. If one department has excess staff, and another has a shortage, it is much easier for the house supervisor to move a nurse between departments than to reduce staffing in one department while at the same time increase staffing in another. The nurse in question must be cross trained for the destination department, and the Employer maintains a list with this information for use by the house supervisor.

In making these adjustments it is the responsibility of the house supervisor to use all the information sources available to assess upcoming needs. This includes readily accessible information such as patients that operating suites will be transferring, but also less certain sources, such as possible upcoming admissions from the emergency department and anticipated discharges. Within the Employer's electronic medical records system the house supervisors have an enhanced ability to view information beyond a nurse working in a certain unit; house supervisors are able to access information from all the departments where they manage staffing, as well as units such as operating suites.

[5] The evidence in the record is mixed whether these are two distinct steps, an offer without the premium followed by an offer with the premium, or whether the first message includes the offer of the IHR premium.

A house supervisor must also consider whether the emergency department has a behavioral health hold, a status that requires a patient to be under constant observation. If a certified nursing assistant or unit secretary is currently working and staffing allows, that individual will be sent to observe the patient, a role referred to as a "sitter." If an employee is not available from the clinical departments, the house supervisor can utilize the sitter list, a list maintained by the Employer that includes all individuals, from departments as diverse as physical therapy to cardiac rehabilitation, that have completed the necessary training to act as a sitter. When there is a need for a sitter the house supervisor contacts the individuals on the list in order and offers the assignment.[6]

The Employer has policies and guidelines regarding staffing beyond the state regulatory requirements. For example, the hospital maintains a "saturation" guideline that instructs the house supervisor and others what action to take if the emergency department receives a large number of critical care patients at one time, exceeding the department's number of beds, and patients must be transported to other hospitals.[7]

(2) Patient Assignment

In addition to arranging the number of nursing staff on duty the house supervisor also assigns nurses to specific patients. Factors relied upon by house supervisors in making these assignments include continuity of care, special skills or expertise, and fairness. Continuity of care involves assigning a nurse to a patient whom they have cared for in the past, generally accepted as being more efficient. Although the record does not include significant information regarding differences in skills between registered nurses for patient assignments, one hypothetical example provided at hearing was a nurse that had additional training in wound care being assigned to a patient with a difficult wound. Fairness appears to be the most impactful factor in assigning patients, in this manner, assigning a generally equal mix of low, moderate and high acuity patients to each nurse to equalize workloads is the goal.

An intensive care nurse testified that the nurses in this unit essentially distribute the patients among themselves and that the house supervisor does not need to make assignments. However, when a disagreement between the unit staff and the house

[6] The record indicates the house supervisor may have the ability to adjust staffing of certain other non-nursing staff, such as certified nursing assistants and unit secretaries. However, the only evidence in the record regarding non-registered nurses is limited to this one example of a "sitter." My decision in this case is based on the record evidence regarding registered nurses.

[7] The record indicates the overnight house supervisor may have a role in notifying classifications beyond just nursing staff that additional help is needed. Examples include a house supervisor, on the night shift, soliciting a second respiratory therapist at the request of the respiratory therapist on duty, as well as a house supervisor notifying the on-call surgical team when an unplanned surgery, an appendectomy, was necessary. The record does not describe the full circumstances surrounding these incidents. In the appendectomy example it is clear the Employer has an on-call mechanism, it is less clear what occurred in the respiratory therapist example.

supervisor does occur, it appears undisputed that the house supervisor's assessment of proper patient distribution is followed.

(3) Incident Command

The Employer has an "incident command" protocol that is utilized in the event of an emergency, such as a natural disaster or the loss of a critical system in the hospital, such as a power failure. The record indicates that if one of these events occurred on the overnight shift it would be the house supervisors that would initiate the incident command protocols. The record indicates that once initiated different people have different responsibilities as directed by the protocol until the situation has passed or been resolved.

The record contains minimal evidence regarding the house supervisors' role in implementing incident command, but it does not appear the house supervisor assigns any duties to any employees as a result. Instead, an overnight house supervisor could initiate the protocols and certain assignments would follow as a function of the policy. Questioned regarding an example where the incident command structure has been initiated overnight, at least one witness mentioned an incident where the hospital lost communication with the rest of the Employer's network. However, in this instance it is not clear the incident command protocols were actually initiated. In that instance the house supervisor appears to have simply notified the administrator on-call so they could respond. Whether this is the extent of the house supervisor's incident command responsibility or whether the protocol was not actually initiated is unclear.

ii) Responsibly Direct

House supervisors are reviewed on a yearly basis. The evaluation states "[house supervisor] is trusted to make decisions on behalf of management," although this statement is not directly correlated to any review factor or rating. The review of a house supervisor is contained in the record, but specific comments regarding the house supervisor being evaluated are omitted. The form contains sections reflecting the house supervisor is evaluated on "conflict management," defined, in part, as the ability to "anticipate, recognize and deal effectively with existing or potential conflicts…;" "empowerment and delegation," defined, in part, as "sharing authority and responsibility with others…;" and "managing people, projects and/or tasks, defined, in part, as "manages collaboratively, and coaches others to achieve optimal performance, delegates effectively; praises/rewards contributions; defines clear roles and responsibilities…" [8]

[8] The record also contains evidence regarding the director of patient care soliciting feedback regarding how nurses are performing from house supervisors when the director of patient care is conducting yearly reviews, reviews that can result in a wage increase. I have not analyzed this evidence under the "reward" component of Section 2(11) as the testimony of the director of patient care makes clear she obtains the

The record does not contain any evidence of any house supervisor receiving discipline, verbal coaching, or other corrective action related to their management of staffing or the nursing staff in general.

iii) Discipline

There is no contention in the record that house supervisors have the authority to discipline or terminate employees independently. However, there are a few examples in the record of a house supervisor verbally correcting and reporting an issue to the director of patient care. Verbal warnings are a form of discipline under the disciplinary provisions of the existing unit contract.

One example involved a house supervisor making a patient assignment, followed by the nurse receiving the assignment arguing with the house supervisor in a patient's room in the presence of the patient. The house supervisor then reported the incident to the director of patient care, and the director of patient care issued a corrective action.[9] The record does not indicate whether the director of patient care, the department supervisor, or any other manager or supervisor independently investigated the situation, or whether the director of patient care *only* relied upon the report of the house supervisor.

Another incident involved a house supervisor observing a nurse in the emergency department violate a pandemic protocol. The house supervisor corrected the nurse in the moment, and then sent an email to the director of patient care memorializing the incident. The exact details of what occurred after that point are not clear from the record, but it appears to have led to a larger dispute that may or may not have involved the house supervisor. Another document in the record, an email from a house supervisor to the director of patient care that served as a shift report, documents another example of reporting. In that email, the house supervisor reported they verbally corrected a nurse in the moment, the employee was not "receptive," and as a result the house supervisor documented the interaction. The house supervisor did not recommend discipline, and there is no evidence this incident resulted in corrective action of any kind. The director of patient care, in her testimony, stated her expectation was that issues appropriate for discipline would be reported to her, but that the house supervisor would correct any problems they observed in the moment.

iv) Hiring

House supervisors have attended some interviews of registered nurses. Under the Employer's procedures the house supervisor, along with the other attendees, complete rating paperwork, including a recommendation – the form provides three

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same information from other sources, including unit nurses, as part of an independent assessment, and that she ultimately makes the determinations in the evaluation.

[9] The corrective action document is in the record, but with portions obscured. However, witness testimony addresses the same incident and there does not appear to be any dispute over the underlying facts.

options "consider for hire," "consider for hire in a different role," and "do not consider for hire" – and then discuss the applicant as a group. To the extent the record describes the process it is the department manager who makes the final decision. There is no contention that a house supervisor makes a determination on their own or has interviewed an applicant without the director of patient care present. The director of patient care testified that she performs her own assessment of all applicants. Although she considers the input of the interview attendees she is not bound by their recommendation and the decision whether to hire is hers.[10]

ANALYSIS

A. *ARMOUR-GLOBE* STANDARD AND FINDING

Whether it is appropriate to add additional employees to a preexisting bargaining unit is a question addressed by the Board's *Armour-Globe* doctrine. *Armour & Co*., 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937). Under the *Armour-Globe* doctrine, employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co*., 918 F.2d 249, 251 (1st Cir. 1990). An incumbent union may petition to add unrepresented employees to its existing unit through an *Armour-Globe* election if the employees sought to be included share a community of interest with unit employees and "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co*., 298 NLRB 993, 995 (1990).

An "identifiable, distinct segment" of the workforce is one that does not unduly fragment the workforce. *Capitol Cities Broadcasting Corp*., 194 NLRB 1063 (1972). Here, the registered nurses are a single classification grouped not just by the Employer, but also by their licensing. There is no evidence of registered nurses outside the voting group sought, or any other factor that would cause any undue fragmentation. Because

[10] At hearing the parties stipulated that the house supervisors perform the same duties, have the same authority, responsibilities, job requirements and benefits. However, as the hearing proceeded, in addition to establishing the responsibilities described in this Decision, the record also made clear that house supervisor Debra Croy, who testified in this matter, had responsibilities far beyond the other house supervisors, including attending certain management meetings, scheduling, approving vacation requests, and reviewing employee timecards. Croy is also assigned "special projects" such as narcotic reports and scheduling for the Employer's COVID screening procedures. The record also makes clear that Croy has, in the past, acted as the director of patient care services and, even when not acting in this role, assisted the director of patient care services with her duties. In light of the parties' stipulation, which I accept, and Croy's role vis-à-vis the director of patient care services position, I find it reasonable to conclude the additional duties performed by Croy do not reflect that any other house supervisors have ever been assigned to those duties. Regarding Croy specifically, whether these duties are sufficient to find her alone a statutory supervisor is a question of whether a "regular and substantial" portion of her time is spent performing these duties. *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000). The record does not quantify the amount of time Croy spends substituting for a supervisor to a degree that I can make that determination. Accordingly, I have directed that she vote subject to challenge in the election.

the registered nurses are an identifiable and distinct segment of the Employer's workforce, I find the first part of the *Armour-Globe* standard is met.

Regarding the second part of the standard, the Board looks to a variety of factors to determine whether a community of interest exists, including the nature of employee skills and functions; common supervision; the degree of functional integration; interchangeability and contact among employees; work sites; general working conditions and fringe benefits; and bargaining history. *International Bedding Company*, supra, slip op. at 2; *Boeing Co*., supra at 153; *NLRB v. Paper Mfrs. Co*., 786 F.2d 163, 167 (3rd Cir. 1984); *Rinker Materials Corp*., 294 NLRB 738, 738-739 (1989).

Here, the parties stipulate the house supervisors, and all the employees in the petitioned-for unit, share a community of interest with the existing unit. Further, this stipulation is supported by record evidence of community of interest factors such as functional integration, a common work site, general working conditions and terms and conditions of employment. Accordingly, based on this stipulation and the evidence in the record supporting the stipulation, I find the petitioned-for election is appropriate consistent with the Board's *Armour-Globe* doctrine.

B. SECTION 2(11) STANDARD

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). As stated by the Board in *Oakwood*, "to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood* at 692. Additionally, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence Hospital*, 320 NLRB 717, 727, 731 (1996), overruled in part by *Oakwood Healthcare*, 348 NLRB at 686, fn.29.

The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc., 348 NLRB 717, 721. (2006).* Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps*

Community Medical Center, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003).

C. SECTION 2(11) FINDINGS

i) Assign

In the Section 2(11) context, "assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee," but "significant overall duties" do not include "ad hoc instructions to perform discrete tasks." *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating an employee to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id*. While distributing working assignments to equalize work among employees' well known skills is considered a routine function not requiring the exercise of independent judgment, in a health care setting, assigning patients to specific caregivers has been found to require the use of independent judgment, where the purported supervisor "balances individualized condition and needs of a patient against the skills or special training of available nursing personnel," or where an employees' "skill set and level of proficiency at performing certain tasks" is tailored to a particular patient. *The Arc of South Norfolk,* 368 NLRB No. 32, slip op. at 4, citing *Oakwood* at 689, 693, 695.

It is also well established that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to request that a certain action be taken. *Golden Crest*, 348 NLRB at 729, citing *Heritage Hall, E.P.I. Corp*., 333 NLRB 458, 459 (2001). Further, assignment of work through a consensus of those that will be affected by the assignment does not meet the additional criteria of independent judgment. *Hospital General Menonita v. N.L.R.B.*, 393 F.3d 263, 267 (1st Cir. 2004).

Assignment is the primary focus of the Employer's arguments in this case. The Employer contends the house supervisors "assign" within the meaning of Section 2(11) by designating a time and place where nurses work, and by designating significant overall tasks using independent judgment. Specifically, they move employees between departments, call in and call off employees, have employees stay over and incur overtime, and make patient assignments. Regarding how independent judgment is demonstrated, the Employer highlights testimony of a house supervisor describing how they balance regulatory requirements, acuity, and productivity in assessing staffing levels. The Employer notes that sometimes this balancing means a productivity goal

may not be met because acuity requires staffing at a certain level.[11] The Employer also references the ability to offer the IHR premium as an example of demonstrating independent judgment.

I find the house supervisors have two distinct roles that implicate assignment in the Section 2(11) context: staffing levels and patient assignment. Addressing these in turn I find that in both the Employer has demonstrated the house supervisors assign nurses to a time and place, but that the evidence is insufficient in either regard to demonstrate these assignments involve independent judgment.

1. Staffing Levels

Regarding staffing levels, nurses are assigned to a place, their department, and a time, on a certain shift, by the schedule. However, house supervisors do alter these assignments when they adjust staffing levels. The question is whether this modification of the schedule involves independent judgment, or whether these adjustments of the staffing level are merely routine. In *Oakwood*, supra, the Board accentuated that a spectrum exists between decisions that are controlled by detailed directions and those that are wholly free from restraints. *Id.* at 693. Where a decision falls on that spectrum, the degree of independent judgment present, is the critical question. *Id*.

Oakwood involved a health care institution, as here. In addressing independent judgment the Board utilized two examples present here: a decision to staff a shift with a certain number of nurses, where that number is determined by a fixed nurse-to-patient ratio, and assigning a nurse where a collective bargaining agreement required that only seniority be followed in making an assignment. *Id.* In both instances the Board explicitly stated the putative supervisor would not be acting with independent judgement. *Id.* The facts of the present case do not line up exactly with those examples, but they are illustrative of why I find independent judgment lacking in this case. The house supervisors are provided a schedule and a pool of patients over several departments. Their first step is to determine whether an excess and deficiency in staffing exists, but this decision follows from standards that they are given, namely the regulatory nurse-to-patient ratios and the Employer's productivity standards. The determination is not complex, it is the job of the house supervisor to reduce staffing to the extent possible while staying in regulatory compliance. Everything that follows, moving nurses between departments, calling in and calling off, is a function of this basic formula. Moreover, when the house supervisors move to the tools available to increase or decrease staffing, they are constrained by the rules established by the Agreement. The house supervisors follow seniority and communicate via pre-determined lists, there is no contention that house supervisors are determining who they wish to choose. Further, in

[11] The Employer also highlights the testimony of several witnesses, called by the Employer, that stated, in response to counsel's question, that they believe these decisions require independent judgment. To the extent this type of question elicits testimony about how the employee demonstrates independent judgment there can be some value in these answers, but the position of the witness on the legal conclusion at issue in the case is not itself evidence.

contacting staff they are merely offering and requesting, they have no authority to demand a change absent a provision in the Agreement, such as the least senior employee being flexed off a shift.

This description does, of course, leave out the third consideration: acuity. That the house supervisors adjust the formula described above based on the condition of patients does make staffing decisions less routine or clerical. However, the record establishes that acuity levels are assigned primarily for the purpose of equalizing workloads between nurses, and the record also establishes that each patient's level of acuity is determined collectively between the house supervisor and the nurses in a given department. To refer to *Oakwood* again, if an assignment is made solely based on equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment. *Id*. at 693. Further, the Board has held that decisions that are made collaboratively, or by a consensus of those involved, are also insufficient to show independent judgment free from the control of others. *CNN America, Inc.,* 361 NLRB 439, 458 (2014); *Hospital General Menonita,* supra at 267.

The above, taken together, suggests house supervisors, in determining staffing levels, are merely engaged in a routine calculation by applying regulations and Employer policy. However, the mere existence of company policies does not eliminate independent judgment if these policies allow for discretionary choices. *Oakwood Healthcare* at 693. In reaching my conclusion I note the nature of the Employer's productivity standard is such that, assessed on a monthly basis, a house supervisor on one shift is never truly acting outside those standards. The record indicates that a house supervisor may not meet productivity standards on a given shift, but in doing so they are not choosing to disregard the standard, they are merely adjusting the numbers that the director of patient care, who is ultimately responsible for compliance with productivity standards, must meet in the future. There is no evidence that house supervisors are themselves held accountable for meeting production standards by the director of patient care, and as such I do not find this constitutes a discretionary choice.

Finally, the Employer asserts house supervisors have the authority to exercise independent judgement in deciding to have employees arrive early or stay late, decisions that impact on overtime, or whether to offer the IHR premium. I do not find this is an accurate reflection of the record evidence. The record establishes that house supervisors have a series of pre-determined tools that are provided to staff the departments at issue. If a house supervisor solicits volunteers without the IHR premium and they are not successful they are expected to offer the IHR premium, they do not "choose" to offer the IHR premium. Certainly, there is no evidence of a house supervisor deciding not to offer the IHR premium when facing a need for additional staff. Similarly, having nurses stay late or arrive early, potentially impacting on overtime, are tools on the house supervisors list. Again, there is no evidence of a house supervisor deciding to forego triggering overtime status because of some other need or consideration. A more accurate description of both circumstances, as it relates to house supervisors, is not that they are "choosing" to offer the premium and overtime, but that these are pre-

authorized to do so under established circumstances. For the reasons stated above, that does not demonstrate independent judgment.

Taken together I find the house supervisors staffing decisions are a routine application of pre-established tools to keep staffing within pre-established standards. I do not dispute that the house supervisors are making decisions about the place and time where nurses will work in a fast-paced and complex environment. However, for the reasons described above, I find these decisions are not imbued with independent judgment and as such do not convey supervisory status under Section 2(11).

2. Patient Assignment

As with the previous consideration, there is no dispute that the house supervisors assign nurses to patients, the question is whether doing so demonstrates independent judgment or is merely a routine function. In *Oakwood*, the Board specifically stated that a registered nurse, weighing individualized conditions and needs of a patient against the skills or special training of available nursing personnel, would be exercising independent judgment. *Id*. at 693. However, as noted above, if an assignment is only made to equalize workloads, or if an assignment involves one obvious and self-evident choice, then the assignment does not indicate the use of independent judgment. *Id*.

In this case, it is asserted patient assignments are based on continuity of care, the special skills or expertise of nurses as they relate to patient need, and the need to equalize workloads. Continuity of care does not provide an opportunity to exercise independent judgment, as it merely requires the nurses and the house supervisor identifying whether a nurse has been assigned to any current patient previously. Similarly, the Board has stated merely equalizing workloads does not require the use of independent judgment. In the instant case if pairing nurses and patients is to constitute assignment in the Section 2(11) sense, then is must be because the house supervisor is examining the special skills and expertise of the nurses and matching this to patient need.

The Board recently addressed this type of situation in *The Arc of South Norfolk*, supra, a case involving an employer's facility for individuals with developmental and intellectual disabilities. There, the Board concluded that the Employer's program coordinators, in assigning clients to case managers, considered factors such as experience of the case manager, which case manager might have the best relationship with that client going forward, or whether the client and case manager were having difficulty working together. *Id*., slip op. at 2. In addressing how program coordinators exercise independent judgment, the Board took particular notice of how clients were not simply assigned to the next case manager available or the case manager with the smallest caseload, but instead the program coordinators made an evaluation of the best fit. *Id*., slip op at 4.

Here, there is minimal to no evidence that this type of assessment takes place. First, while nurses in different departments may have different special skills or expertise, the evidence strongly supports finding the nurses within a department have interchangeable skills and do not have abilities that distinguish one another. The one example provided in the record is a nurse that had specialized training in wound care, but this was provided by a witness as a hypothetical and it is not at all clear that this type of assessment has actually been made in the past, or is made with any regularity. The record here simply does not contain the level of detail that was present in the Board's assessment in *The Arc of South Norfolk*, the level of detail necessary to find that independent judgment is being utilized in making patient assignments. For that reason, I conclude the assignment of patients to nurses by house supervisors is similarly of a routine nature.[12]

ii) Responsibly Direct

The Board has defined "responsibly to direct" as: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible'... and carried out with independent judgment." *Oakwood*, 348 NLRB at 691. The Board explained that direction is "responsible" when the person delegating the task is held accountable for the performance of the task by others and there is the prospect of adverse consequences if the tasks are not performed properly. *Id.* at 692. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood*, 348 NLRB at 695.

The present case does not contain the evidence of accountability that is the necessary to make a responsible direction finding. The Employer argues the house supervisor evaluation contained in the record shows that house supervisors are evaluated on the quality of their supervision, and that a higher rating results in a higher merit increase. This may be true, but it is not supported by the record evidence. The evaluation in the record, with comments specific to the employee redacted, is essentially a blank form. That form includes rating categories such as "conflict management," and "empowerment and delegation," but these are little more than headings, the descriptions are similarly vague, and it is impossible to determine what

[12] Because the evidence in the record is minimal, I have not addressed the house supervisors' purported authority to initiate an incident command response in detail. The record indicates that during the day shift hospital administration determines when to initiate incident command procedures. On the night shift, the house supervisor may do so, but the example in the record limits this involvement to simply contacting the administrator on-call. I do not find this enough to demonstrate independent judgment or supervisory status whether considered under "assign" or another Section 2(11) factor.

this means in practice.[13] The testimony of the director of patient care was similarly general on this point. Given that the Board's standard is so specific that the *Croft Metals* example above did demonstrate responsible direction, but the *Oakwood* example did not, the generalized evidence on this point is insufficient to carry the Employer's burden.

iii) Discipline

The actual authority to discipline, rather than "paper authority" present in job descriptions and other documents is necessary to establish supervisory status. *Golden Crest*, 348 NLRB at 731, quoting *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). The power to point out and correct deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees' job status. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Rather, to confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001).

It is undisputed the house supervisors do not have the authority to discipline other employees. The prospect of finding supervisory status in this factor is purely based on whether reporting incidents to the director of patient care constitutes effective recommendation.

The corrective action involving a house supervisor in the record is an example of reporting, and personnel action clearly resulted, but the record lacks the specificity to determine whether the director of patient care, the department supervisor, or any other manager independently investigated the situation. From the evidence available there is simply no way to know whether the house supervisor in this instance effectively recommended that discipline or whether it was an independent determination of the director of patient care. In regard to the other examples in the record, the lapse in pandemic protocol and the incident described in the shift report, it is not clear a personnel action occurred. If personnel action did occur, these incidents similarly lack the specificity to demonstrate whether independent investigation was involved. The testimony of the director of patient care, in stating her expectation was house supervisors would correct any problems they observed in the moment and then report to her, suggests that she would engage in a level of independent investigation, and she does not claim she would rely on this type of reporting without investigation.

[13] It should be noted that the same can be said of the house supervisor position description. It contains general language that might suggest supervisory authority, but by itself it is neither specific enough nor supported by evidence of actual authority to support a Section 2(11) finding.

Taken together and considering the Board's holdings regarding this factor, I do not find the evidence establishes house supervisors are statutory supervisors as a function of their ability to effectively recommend discipline.

iv) Hire

The Board has repeatedly held that an individual participating in an interview does not effectively recommending hiring where acknowledged supervisors also interview the candidates. *The Republican Co*., 361 NLRB 93, 97 (2014), citing *J. C. Penney Corp*., 347 NLRB 127, 128-129 (2006). This is true even where the unit employee offers their opinion or makes a recommendation regarding the candidate. *Ryder Truck Rental, Inc*., 326 NLRB 1386, 1387 fn. 9 (1998), citing *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

Here, the evidence demonstrates house supervisors have occasionally sat on interview panels in the past, and in doing so have participated in post-interview discussions and completed a rating sheet that includes a recommendation. However, the record does not include any evidence beyond this level, insufficient under the Board's standard, and there is no contention that the house supervisors have any independent authority to hire. Based on this, I do not find the Employer has met its burden of demonstrating supervisory status regarding hiring authority.

For these reasons, I have concluded that the Employer has not met its burden to establish supervisory status under Section 2(11) by the factors considered or any other factor enumerated in that Section of the Act.

CONCLUSIONS

I have determined that the voting group sought by Petitioner is appropriate, and I shall direct a self-determination election among the employees in the petitioned-for voting group. Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[14]

[14] During the hearing the parties stipulated to the following commerce facts:
The Employer, Mark Twain Medical Center, an affiliate of Dignity Community Care, a California non-profit corporation and a Colorado non-profit corporation, respectively, is engaged in the operation and staffing of an acute care hospital located in San Andreas, California, and affiliated rural clinics. Within the past twelve months, a representative period, the Employer's gross revenues exceeded $250,000 and during this same period, the Employer purchased and received goods, supplies and materials valued in excess of

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time house supervisors, nurse practitioners, and clinical social workers employed at Mark Twain Medical Center located in San Andreas, California;
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above.[15]

This question shall appear on the ballot:

Do you wish to be included in the existing bargaining unit with non-professional and professional employees already represented by Service Employees International Union, United Healthcare Workers-West? The choices on the ballot will be "Yes" and "No."

If a majority of valid ballots are cast for Service Employees International Union, United Healthcare Workers-West part-time house supervisors, nurse practitioners, and clinical social workers will be taken to have indicated their desire to be included in the existing unit of non-professional and professional employees. If a majority of valid ballots are not cast for representation, they will be taken to have indicated their desire to remain unrepresented.

A. Election Details

I have determined that a mail ballot election will be held. As of the hearing date, Petitioner has not waived the ten days it is entitled to have the voter list described below.

$5,000 directly from enterprises located outside the State of California.

[15] The parties stipulate that all classifications in the voting group are professional employees, and I accept that stipulation based on the record facts. The instant election therefore only includes one, professional voting group. However, because Petitioner seeks to include professional employees in a mixed unit of professional and non-professional employees it is necessary to use a ballot consistent with *Sonotone Corp.*, 90 NLRB 1236 (1950).

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on Tuesday, October 29, 2020,** ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300-N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by November 5, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 32 Office at **(510) 637-3300** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572).**

All ballots will be commingled and counted at the Regional Office on Wednesday, November 18, 2020.[16] In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period October 3, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

House Supervisor Debra Croy may vote in the election but her ballot will be challenged because her eligibility has not been resolved. No decision has been made regarding whether she is included in, or excluded from, the bargaining unit, for the reasons described in this Decision. The eligibility or inclusion of Croy will be resolved, if necessary, following the election.

[16] If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals who, according to this Decision, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 19, 2020.** The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Per the parties stipulation on the record, the voter list will be provided in an Excel format.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates

electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California this 15th day of October 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
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